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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 801

WILMETTE PARK DISTRICT, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 25-27, 41-44) are reported at 76 F. Supp. 924. The opinion of the Court of Appeals (R. 63-69) is reported at 172 F. 2d 885.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1949. (R. 69.) Petition for rehearing was denied March 18, 1949. (R. 70.)

The petition for a writ of certiorari was filed on May 18, 1949. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether Section 1700 of the Internal Revenue Code, which imposes a tax on charges paid for admission "to any place", applies to charges made by petitioner, a local governmental agency, for admission to a public bathing beach.

2. Whether collection of the tax is unconstitutional as a burden on a state activity which is immune from federal taxation or because under Section 1718 of the Code liability for the tax rests on petitioner by reason of its refusal to collect the tax from persons seeking admission to the beach.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 13-18.

STATEMENT

The essential facts found by the District Court (R. 41-44), taken principally from the stipulation of facts (R. 11-14), are as follows:

Petitioner is a body politic and corporate organized in 1908 under the laws of Illinois. Illinois Revised Statutes (1945), c. 105, Sections 256 through 295. It is administered by a board of commissioners under the provisions of the Illinois

statutes elected by the people residing in the district. (R. 41.)

The Wilmette Park District consists of an area of approximately 2.8 square miles located within the incorporated area of the Village of Wilmette, Cook County, Illinois, which village has a population of approximately 20,000. Included within the District are four park areas aggregating approximately .78 square miles. The largest park area, known as Washington Park, extends along the shore of Lake Michigan for approximately three-fourths of a mile. The land area of Washington Park was acquired partly by grant from the State of Illinois, partly by purchase and partly by the exercise of the right of eminent domain. (R. 41-42.)

For more than 25 years, petitioner's riparian property at the north end of Washington Park and in the shoal waters of Lake Michigan adjacent thereto has been used as a bathing beach during the summer months. (R. 42.)

During the years 1941 through 1944, petitioner supplied the following services and facilities for use in conjunction with the bathing beach: a bath house containing clothing lockers, toilets and wash rooms, an automobile parking area, life-saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first-aid personnel, and supplies. In connection with the operation and maintenance of the bathing

beach, petitioner employs a beach superintendent, a secretary, beach maintenance labor, life guards, check room and gate check workers, general office workers and policemen. (R. 42.)

The bathing beach facilities are utilized principally by the residents of the Wilmette Park District, but the facilities are also utilized by non-residents. (R. 42.)

Petitioner makes two types of charges to users of the beach and beach facilities: (1) a flat rate for a season ticket issued on either an individual or family basis, and (2) a single daily admission charge of 50 cents on week-days and $1 on Saturdays, Sundays and holidays, for which no tickets are issued. The charge made by petitioner for the use of the beach and beach facilities is made to cover maintenance, operation and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District. (R. 42-43.)

From Gary, Indiana, to Lake Bluff, Illinois, there are 29 municipally operated bathing beaches, some of which do and some of which do not charge admissions. From South Chicago to Highland Park, Illinois, there are 15 Lake Michigan bathing beaches operated by private persons for profit, of which nine charge admissions and six are operated by hotels and clubs, for the use of their patrons,

residents, and members, without any express or specific admission charge. (R. 43.)

On July 24, 1941, the Collector of Internal Revenue notified petitioner to collect an admission tax on all bathing beach tickets sold on and after July 25, 1941. Petitioner did not, during the year 1941 or in any prior years, collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act.[1] (R. 43.)

Subsequently, the Commissioner of Internal Revenue assessed and collected from petitioner, under the provisions of Sections 1700 and 1718 of the Internal Revenue Code, admissions tax on the amounts paid as admissions to petitioner's bathing beach from July 25, 1941, to October 1, 1941, and during the years 1942 through 1945. Petitioner filed timely claims for refund, which were rejected, and this suit was begun. (R. 43-44.)

The District Court entered judgment in favor of petitioner for refund of the tax paid.[2] (R. 45.)

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[1] A stipulation filed in the Court of Appeals on February 2, 1949 (R. 62), states that—

> the Wilmette Park District did not during the years 1942, 1943, 1944 or 1945 collect from purchasers who paid admissions to its bathing beach facilities any amount to cover the admissions tax alleged to have been imposed by the Admissions Tax Act (53 Stat. 189, as amended, c. 10, Title 26, U.S.C.A., Sec. 1700).

[2] The judgment did not include refund of the amount of tax paid for 1941, that amount having been paid to respondent's predecessor. (R. 26.)

The Court of Appeals for the Seventh Circuit reversed. (R. 63-69.)

ARGUMENT

1. The question whether Congress intended the admission tax to apply to charges for the use of public beach facilities, does not, in the absence of a conflict of decisions, require further review. Section 1700 of the Internal Revenue Code (Appendix, *infra*, p. 13) imposes a tax upon "the amount paid for admission to any place, including admission by season ticket or subscription". See also Section 1704 (Appendix, *infra*, p. 13). Contrary to petitioner's argument (Pet. 16-18), no question of Congressional intent is presented by the fact that in the present case use of the bathing beach facilities was included in the charge on which the tax was levied. The charge was plainly for admission to the bathing beach and thus is covered by the statute.[3] Nor is any question of construc-

[3] Petitioner "makes a charge to all persons for admission to the bathing beach" (Stip., R. 12) and, as the court below stated (R. 65-66), the beach facilities cannot be used until entrance is made by payment of the admission charge and "the person after entering the place has the option of using the facilities or not as such person sees fit". Thus, the court below was correct in concluding (R. 65) that the charge made by petitioner "comes squarely within the statutory definition" of a charge paid for admission "to any place", as well as within the provisions of Sections 101.2 and 101.3 of Treasury Regulations 43 (Appendix, *infra*, pp. 14-17), which, among other things, define the phrase "to any place" as meaning a definite enclosure or location. See also Section 101.4, Treasury Regulations 43 (Appendix, *infra*, p. 17).

A charge is no less an admission charge because it also includes use of the place or of facilities contained in the place to which admission is charged. *Exmoor Country Club* v.

tion raised by the fact that the charge involved here was made by a local governmental agency. Petitioner's argument is that, since Congress did not explicitly state that the tax applies to admissions charged by States or State agencies, the statute should be construed as inapplicable to such admission charges. Petitioner's reliance on certain language in the concurring opinion of Mr. Justice Rutledge in *New York* v. *United States*, 326 U. S. 572, 585, is misplaced. A contrary rule of construction was applied in that case, and in his concurring opinion Mr. Justice Rutledge recognized (p. 586) that in previous cases the Court had applied the contrary rule and in at least one case made a ruling to that effect. See also, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Allen* v. *Regents*, 304 U.S. 439.

United States, 119 F. 2d 961 (C.A. 7th); *Twin Falls Natatorium* v. *United States*, 22 F. 2d 308 (D. Idaho); see also, *Chimney Rock Co.* v. *United States*, 63 C. Cls. 660, certiorari denied, 275 U. S. 552. Petitioner's argument to the contrary (Pet. 16-18) is based upon unsupported assertions that the admission tax has not been levied on charges made for the use of certain facilities, such as tennis courts, ice skating facilities, etc., under circumstances which petitioner does not explain. Whether the admission tax is applicable in any given case depends upon the circumstances of the case. For example, despite petitioner's assertion that the tax is not levied on the use of ice skating facilities, it has been held that charges paid for the use of a swimming pool or skating rink, to which admission was denied except upon payment of the charge, are subject to the admission tax. *Exmoor Country Club* v. *United States, supra; Twin Falls Natatorium* v. *United States, supra.* On the other hand, where free access to and use of a place is allowed and a charge is made only for rental or services, the charge is not subject to the admission tax. See Treasury Regulations 43, Section 101.2.

Moreover, the rule of construction urged by petitioner cannot properly be applied in this case. In *Allen* v. *Regents, supra,* the tax imposed on charges for admission "to any place" was held to apply to admission charges to football games conducted by a state agency. Section 101.16 of Treasury Regulations 43, as amended (Appendix, *infra,* p. 18), has since 1942 provided that admission charges are not exempt from the tax[4] by the fact that the authority charging the admission is a state or political subdivision thereof.[4] Since Congress has not amended Section 1700 to provide such an exemption, the interpretation of the statute reflected by Section 101.16 of the Regulations and by *Allen* v. *Regents, supra,* which was decided in 1938, must be taken to be correct. *Helvering* v. *Winmill,* 305 U.S. 79, 83.

2. The decision below raises no important constitutional questions requiring decision by this Court. The assertions are based on a twofold ar-

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[4] In view of the express provisions of Section 101.16 of the Regulations, it is obvious that there is no merit in petitioner's assertion (Pet. 19-20) that certain provisions of Section 101.2 of the Regulations tend to support the exemption. The provisions petitioner relies upon are quoted in the Appendix, *infra,* pp. 15-16, and relate only to amounts paid to become regularly entitled to the privileges of a club or other organization—amounts which, as the Regulations indicate, may be subject to the altogether different tax imposed upon dues and membership fees by Section 1710(a)(1) of the Code (26 U.S.C. 1946 ed., Sec. 1710). Moreover, petitioner's argument in this connection relates only to the season tickets it issued and the statute itself imposes the tax upon amounts paid for admission to any place, "including admission by season ticket or subscription".

gument, first, that the imposition of the tax in this case "is an unconstitutional burden on a State activity which is immune from Federal taxation" (Pet. 7) and, second, that "The Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds" (Pet. 15) when, as here, it refuses to collect the tax.

The first argument, as the court below stated (R. 67), is answered and controlled by *Allen* v. *Regents*, 304 U. S. 439, where it was held that the admission tax applies to charges for football games conducted by a state agency. That holding was made despite the fact that the funds derived from the games were used in aid of necessary governmental functions (p. 452) and despite the assumption that the holding of athletic contests "is an integral part of the program of public education conducted by Georgia" and thus is a "governmental function" (p. 449). The important fact, the Court stated in that case (p. 452), was that the state, in order to raise funds in support of its education system (which, in the case of the University of Georgia, included the repayment of loans obtained to build the stadium) had embarked on a business having the incidents of similar enterprises usually prosecuted for private gain. The operation of a bathing beach is a business which is often (see R. 13), if not usually, prosecuted for private gain, and is as much of a "business" as the holding of athletic contests.

Nor is petitioner's argument supported by *New York* v. *United States*, 326 U. S. 572. The tax here does not discriminate against the States, and thus appears to satisfy the test laid down in the opinion of Mr. Justice Frankfurter (pp. 573-584) in which Mr. Justice Rutledge joined. Under the principles declared in Mr. Chief Justice Stone's concurring opinion (pp. 586-590), immunity would be accorded only for a tax which unduly interferes with the State's performance of a sovereign function of government. No undue interference with a sovereign function of government was found in that case, where the question was whether the State of New York is immune from the federal tax on the sale of mineral water. Similarly, the collection of the admission tax in this case would seem clearly not to interfere unduly with a sovereign function of government. Even if the maintenance of a bathing beach is regarded as a "sovereign function" of government, the collection of a tax on the charge made by petitioner for admission to the beach, a tax which is payable by the persons seeking admission, is not an undue interference with the operation or maintenance of the beach or with the furnishing of bathing facilities to the public.[5]

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[5] Petitioner points to the statement in the concurring opinion in *New York* v. *United States*, *supra*, to the effect that a real estate tax on public parks cannot constitutionally be imposed (Pet. 11), but a real estate tax upon the state itself is quite different from an admission tax payable by members of the public seeking admission to a bathing beach.

While it may be that the tax in this case has been or will ultimately be paid from petitioner's general funds by reason of petitioner's refusal to collect the tax after notice to do so, that fact raises no important constitutional question. Section 1715 (a) of the Code (Appendix, *infra*, pp. 13-14) placed on petitioner the duty of collecting the tax from the persons seeking admission to the beach. The imposition of that duty on a local agency of a state is constitutional. *Allen* v. *Regents*, 304 U. S. 439. For failure to collect the tax, petitioner is subject under Section 1718 (Appendix, *infra*, p. 14) to a penalty in the amount of the tax which it failed to collect. Since the imposition of the obligation to collect the tax is constitutional, the imposition of a penalty, being a sanction to obtain performance, is also constitutional. As the court below stated (R. 68), "To permit plaintiff to escape its obligation because its elected officials refused to perform their statutory duty would in effect nullify the statute". Thus, contrary to petitioner's contention (Pet. 15), no question of infringement of its sovereignty is involved. See *Allen* v. *Regents*, *supra*. Petitioner's liability for payment of the tax results only from the wrongful act of its officials in refusing to collect the tax. The effect of the wrongful act may be of concern as between petitioner and the officials who wrongfully refused to collect the tax, but it raises no constitutional question. Nor is any constitutional question raised by petitioner's argument (Pet. 15) that it is immune

from such process as a sheriff's levy and a collector's distraint levy. No such process was issued. This is a suit for refund of a tax which taxpayer has paid.

CONCLUSION

The decision below is correct and presents no important question. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1949.

Internal Revenue Code:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

(a) *Single or Season Ticket; Subscription.*—

(1) *Rate.*—A tax of 1 cent for each 10 cents [6] or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription * * *.

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1700.)

SEC. 1704. ADMISSION DEFINED.

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor.

(26 U.S.C. 1946 ed., Sec. 1704.)

SEC. 1715. PAYMENT OF TAX.

(a) *Collection by Recipient of Admissions, Dues, and Fees.*—Every person receiving any payments for admissions, dues, or fees, subject to the tax imposed by section 1700 or 1710 shall collect the amount thereof from the per-

[6] Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21, changed the rate to 1 cent for each 5 cents or major fraction thereof.

son making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 1710.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1715.)

SEC. 1718. PENALTIES.

* * * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1718.)

Treasury Regulations 43 (1941 ed.):

Sec. 101.2 *Meaning of "Admission."*—The tax is imposed on "the amount paid for *admission* to any place," and applies to the amount which *must be paid* in order to gain admission to a place. (See section 101.4.) The term "admission" means the right or privilege to enter into a place. The law specifically pro-

vides that it shall also include "seats and tables, reserved or otherwise and other similar accommodations." A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or window to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or is separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700(a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

* * * * *

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

* * * * *

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming

pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life members of such clubs, by section 1710 of the Code. (See Subpart F.)

* * * * *

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnish-

ing his own property or equipment, as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3 *Meaning of the Term "Place."* —The tax under section 1700(a) of the Code is on the amount paid for admission *to any place.* "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location. The inclosure or location may be on, above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.4 *Basis, Rate, and Computation of tax.*—* * *

The tax applies whether any profit is contemplated or realized and whether the affair to which admission is charged is public or private.

* * * * *

The amount paid for admission to any place is the amount which must be paid to the person or persons controlling such admission in order to secure the privilege. * * *

Sec. 101.16 [as amended by T.D. 5170, 1942-2 Cum. Bull. 246] *Admissions by or for the Benefit of Federal, State, or Municipal Governments.*—The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. For exception see section 101.15(b). The Code specifically provides that the taxes on admission shall be paid by the person paying for admission. It is not, therefore, a tax on the person or authority selling the admissions or receiving the proceeds thereof.

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